(3)

No. 03-821

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In The
Supreme Court of the United States

FLORA HOLLAND, WARDEN,

Petitioner,

v.

FRANK E. ADAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In opposing certiorari, respondent argues that review is unwarranted because the case is in an interlocutory posture, there is no conflict among the circuits on the issues presented, the case involves only a routine application of a properly stated principle of law to the unique facts of this case, the Sixth Circuit is in a better position than this Court to interpret Tennessee law, and the decision below is correct.

None of those arguments is sound. Despite the fact that discretionary review by the Tennessee Supreme Court has been and plainly remains an established part of the normal appellate process in Tennessee and, thus, is a remedy to which a prisoner must resort in order to exhaust state remedies, *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), the Sixth Circuit has held that a rule adopted by the Tennessee Supreme Court, purporting to remove discretionary review as a prerequisite for exhaustion of state remedies, makes discretionary review unavailable for 28 U.S.C. § 2254 purposes. And, despite the fact that respondent failed to press his confrontation-rights claim to the Tennessee Supreme Court in his application for discretionary review eight years before the rule's adoption, the Sixth Circuit retroactively applied the rule to excuse respondent's procedural default. Because the Sixth Circuit has decided two important federal questions in a way that conflicts with *Boerckel*, this Court's review is warranted.

1. The fact that the court of appeals has remanded this case to the district court for further proceedings does

not present an impediment to immediate review.[1] Despite the interlocutory status of a case, this Court has granted certiorari when the opinion of the lower court has decided an important question – otherwise worthy of review – and intervention may serve to hasten or finally resolve the litigation. *See, e.g., Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994) (reversing court of appeals' decision setting aside district court's grant of summary judgment); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) (reversing court of appeals' decision setting aside district court's grant of motion to dismiss); *Estelle v. Gamble*, 429 U.S. 97 (1976) (reversing court of appeals' decision setting aside district court's dismissal of complaint for failure to state a claim).

For the reasons stated in the petition, the Sixth Circuit's decision raises two important questions worthy of the Court's consideration. And this Court's intervention may serve to hasten the litigation. The habeas corpus petition in this case was filed in 1999. The district court's grant of summary judgment on procedural default grounds correctly concluded the litigation in 2000. The federal habeas statute contemplates "a swift, flexible, and summary determination" of a petitioner's claims. *Preiser v. Rodriguez*, 411 U.S. 475, 495 (1973). But the Sixth

[1] Respondent suggests that the district court already has undertaken further proceedings on remand. While the mandate of the court of appeals has not been stayed, the district court has not ordered any further proceedings as yet. Respondent's motion to set a briefing schedule (R. 50), to which petitioner has filed a response in opposition, urging the court to await disposition of this petition for a writ of certiorari before ordering any further proceedings (R. 51), is under advisement by the district court.

Circuit's reversal, premised on an incorrect interpretation of this Court's precedent and requiring consideration of the merits of Adams' confrontation-rights claim now four years after the district court's final judgment, needlessly prolongs the litigation.

2. Respondent's contention that there is no conflict among the circuits concerning a state's ability to structure its own court system and identify available state remedies for purposes of exhaustion misapprehends petitioner's argument. First, it is this Court's decision in *Boerckel* with which the court of appeals' decision conflicts. *See* U.S.S.Ct. Rule 10(c). Second, the fact that other circuits have recognized that states may identify second-tier review by a state supreme court as being unavailable for exhaustion purposes beggars the question in this case: Does Rule 39 accomplish that result when the Tennessee Supreme Court has left in place Rule 11, Tenn.R.App.P., which provides for an application for permission to appeal in the Supreme Court and standards governing the grant of review of such applications, and has published the Rules' advisory commission comments explaining that Rule 39 "works no change to T.R.A.P. 11 itself?" Finally, the lower courts *are* in conflict on the second question presented in the petition: whether retroactive application of Rule 39 conflicts with *Boerckel*. *See, e.g., Wenger v. Frank*, 266 F.3d 218, 226 (3d Cir. 2001) ("if a remedy was available . . . at some time in the past, it is difficult to see how that fact can be retroactively altered"); *Mattis v. Vaughn*, 128 F.Supp.2d 249, 262 (E.D. Pa. 2001) (retroactive application would "greatly increase" burden on federal courts without affording relief to state supreme court's docket).

3. Respondent's contention that the petition merely requests application of a properly stated rule of law to

unique facts again demonstrates a misunderstanding of petitioner's argument. The Sixth Circuit has not merely misapplied a settled principle of law; it has created a new rule, one that is clearly contrary to *Boerckel*'s holding that prisoners must resort to discretionary review if such review is an "established part of the State's appellate review process." *Boerckel*, 526 U.S. at 845. The court of appeals' decision makes efficacious a state supreme court's mere declaration that it deems discretionary review "unavailable," despite the plain fact that discretionary review obviously remains available to each and every litigant passing through the Tennessee courts. Such blind deference to a state court's recitations has never been countenanced by this Court. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456 (1958) (certiorari jurisdiction not defeated if nonfederal ground relied on by state court is without any fair or substantial support).

4. Respondent's suggestion that this Court should defer to the court of appeals' "interpretation" of Tennessee law is likewise misplaced. Petitioner is not asking this Court to interpret Rule 39. The rule is clear enough on its face. Rather, the question petitioner has posed is whether, under this Court's precedent, Rule 39 *can* make discretionary review "unavailable" for federal habeas purposes merely by declaring that as its objective, and, even if it can, whether the rule may be retroactively applied to resurrect a claim that was clearly procedurally defaulted at the time state collateral review of respondent's conviction and sentence was concluded. Thus, there is no need to resolve any "nuances" of state law or a need for "greater familiarity" with issues of state law in order to decide this case. And, contrary to respondent's assertion, Br. in Opp. 6-7, petitioner has not waived reliance on the Tennessee

rules, advisory commission comment, and several reports urged in support of its position. These authorities are relied on to support a consistent argument – made both in the court of appeals and in this Court – that Rule 39 does not and cannot as a matter of law render discretionary review unavailable for exhaustion purposes. Thus, these authorities are properly presented. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (since petitioners "raised a taking claim in the state courts, they could have formulated any argument they liked in support of that claim here").

5. Respondent contends that the Sixth Circuit's interpretation and application of Tennessee law is correct, arguing that Rule 39 on its face applies to all appeals from and after July 1, 1967, was promulgated by the Tennessee Supreme Court to clarify that denial of relief by the Court of Criminal Appeals constitutes exhaustion for federal habeas corpus purposes, and was intended to reduce the appellate backlog in criminal cases. But this argument misses the mark. Petitioner takes as a given the plain wording of the rule and what the Tennessee Supreme Court intended to accomplish by its adoption, and petitioner fully recognizes that "there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Boerckel,* 526 U.S. at 847. The issue, however, is whether Rule 39 can be held to have accomplished its goal to make discretionary review unavailable when it patently remains an established part of the state's appellate review process, which, under *Boerckel*'s clear holding, a prisoner must pursue in order to exhaust state remedies.

Respondent does not attempt to square the Sixth Circuit's decision with *Boerckel*. He cannot. Rule 11

discretionary review remains in the arsenal of remedies available to all Tennessee litigants, and the Tennessee Supreme Court, after the adoption of Rule 39, continues to afford relief to criminal litigants whose "right to seek second-tier review pursuant to Tennessee Rule of Appellate Procedure 11" has been denied. *State v. Evans*, 108 S.W.3d 231, 234 (Tenn. 2003).

Under 28 U.S.C. § 2254, a habeas petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Rule 11 review remains an established part of Tennessee's normal appellate review process. *Boerckel* therefore commands that the remedy be exhausted, despite the Tennessee Supreme Court's effort to circumvent that requirement.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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